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No. _____

In The

Supreme Court of the United States

October Term, 1998

BENJAMIN G. SPRECHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the definition of 18 U.S.C. 201(c)(2) made by the Tenth Circuit in *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) contrary to the intent of Congress and did this definition cause 18 U.S.C. 201(c)(2) to be void for vagueness and/or overbroad, as well as violative of the 5th and 6th Amendments of the United States Constitution?

2. Whether the exclusion of U.S. government prosecutors and/or other U.S. government employees from the provision 18 U.S.C. 201(c)(2) will permit or encourage improper use or abuse of prosecutorial power.

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PETITION FOR A WRIT OF CERTIORARI

Dr. Benjamin G. Sprecher respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, A1-A10) is unreported.

JURISDICTION

The court of appeals entered its judgment on May 28, 1999 (App., *infra*, A1-A10). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the Constitution of the United States provides, "***nor shall any person*** be deprived of life, liberty, or property, without due process of law."

Amendment VI to the Constitution of the United States provides, in relevant part, "[I]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him."

18 U.S.C. § 201(c)(2) provides in relevant part, the following:

> (c) Whoever . . .
> (2) directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial before any court . . . shall be fined under this title or imprisoned for not more than two years, or both.

STATEMENT

I. Procedural History

On January 9, 1992, after a bench trial, Petitioner, Dr. Benjamin G. Sprecher, was convicted of various securities charges and related offenses. *United States v. Sprecher*, 783 F. Supp. 133 (S.D.N.Y. 1992). On direct appeal, his conviction was affirmed; but his case was remanded for re-sentencing. *United States v. Sprecher*, 988 F.2d 318 (2d Cir. 1993). On remand, his sentence of

imprisonment was reduced to thirty-seven months and an amended judgment of conviction so reflecting was entered on March 13, 1993.

In the Spring of 1993, Dr. Sprecher filed *pro se* motions challenging his conviction and sentence which were treated as a motion pursuant to 28 U.S.C. § 2255. On March 29, 1994, the district court entered a Memorandum and Order, denying the requested relief in its entirety.

On appeal, the Second Circuit affirmed and denied rehearing. A Petition for a Writ of Certiorari was filed on July 14, 1995 which was denied. 133 L.Ed. 2d 205 (1995).

On March 1, 1996, Dr. Sprecher filed a second 2255 petition based upon newly discovered evidence, some of which the government had only released after a lengthy Freedom of Information lawsuit as well as a Recusal Motion. In his 2255 petition, Dr. Sprecher raised various constitutional issues primarily attorney conflict, government misconduct, including perjury by AUSA's concealment of exculpatory evidence, and agreements with witnesses, concealment of the psychotic condition of the government's "star witness," concealment of other *Brady* and *Giglio* violations. The government never denied any of the allegations presented in Dr. Sprecher's 2255 Petition. The original trial judge granted Dr. Sprecher's Recusal Motion on October 3, 1996. The case was reassigned to District Court Judge Robert P. Patterson who, on April 1, 1997, entered an order denying without a hearing Dr. Sprecher's 2255 motion. On appeal, the Second Circuit affirmed.

On July 17, 1998, Dr. Sprecher filed a "Motion for a Writ of Error Coram Nobis" which was based upon the decision in *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1988). The district court almost immediately summarily dismissed the Coram Nobis Motion

as a second or successive motion which, pursuant to 28 U.S.C. § 2244(b)(3)(A) had to be filed with the Court of Appeals. Dr. Sprecher appealed. The Second Circuit, while holding that the District Court erred (A 4) nonetheless, upheld the dismissal based upon the *en banc* decision in *U.S. v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) ("*Singleton II*") (A 9).

JURISDICTIONAL STATEMENT

The Court of Appeals had jurisdiction to hear the appeal pursuant to 28 U.S.C. § 1291 and this Court has jurisdiction to review this pursuant to 28 U.S.C. § 1254(1). Petitioner asserts that the interpretation of 18 U.S.C. § 201(c)(2) ("§ 201(c)") in *Singleton II* is contrary to congressional intent and established statutory construction; renders § 201(c) void for vagueness or overbreadth; results in limitations on criminal defendants' due process rights and Sixth Amendment (confrontation clause) rights; and will result in a degeneration of the federal judicial system through the encouragement of perjury and other illegal acts.

II. Facts Material to the Consideration of Questions Presented

The following is a concise statement of the facts relevant to this court's consideration of the questions presented.

Dr. Sprecher's Conviction

Dr. Sprecher, who has a Ph.D. in economics, a former professor of law and economics, a noted expert in security law, an author of various articles, as well as an ordained orthodox rabbi, was convicted after a bench trial.

As noted in the trial court's decision,[1] and in its recusal decision,[2] Dr. Sprecher's conviction after bench trial was based upon the trial court's belief in the credibility of the government's witnesses and government representations.

Almost all of the witnesses at Dr. Sprecher's trial were bribed by the United States Attorney's Office ("U.S. Attorney"), as well as the United states Securities and Exchange Commission ("SEC").

In order to provide a clearer understanding of the dangers of the *Singleton II* decision, it is appropriate to consider certain facts relating to Dr. Sprecher's case which may appear incredible and certainly unconscionable. None of these facts have been denied by the government.[3]

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1 *United States v. Sprecher*, 783 F. Supp. 133 (S.D.N.Y. 1992)

2 The trial court Judge Cedarbaum recused herself after petitioner's recusal motion which was based on *Halliday v. United States*, 380 F.2d 270 (1st Cir. 1967), *United States v. Wolfson*, 558 F.2d 59 (2nd Cir. 1977), and *United States v. Robin*, 553 F.2d 8 (2nd Cir. 1977) which mandate the disqualification of a judge at a hearing when the judge had previously made determinations (at a bench trial or hearing) based upon the credibility of witnesses whose credibility was being questioned.

3 The latest opportunity for a government denial occurred in the proceedings leading to the instant Petition for Certiorari. The government requested a delay from the Second Circuit's Court of Appeal giving as a reason the necessity to reply to Dr. Sprecher's lengthy allegations of judicial and governmental misconduct. Though the delay was granted, the government was unable to respond in any

Dr. Sprecher, who had antagonized several individuals at the SEC by refusing to bow to pressure and by winning a case brought against him, became the target of various SEC investigations. None of these investigations resulted in even a civil charge being brought against Sprecher.

In 1984-1985, a Thompson von Stein ("von Stein") of the SEC determined to investigate and destroy Sprecher in a different way. Specifically, he would investigate all of Sprecher's law clients. Sprecher sued to prevent such actions and the government initiated the pattern of behavior it would follow in the future. The government presented a false affidavit stating that Sprecher's investigation was one of a number of cases arising out of an investigation by a different entity. The court believed these affidavits. Based upon the concededly false affidavit, this Court accepted the SEC false statement that the investigation of Sprecher's clients was not attributable to their use of Sprecher as an attorney (*Sprecher v. von Stein*, 772 F.2d 16 (2nd Cir. 1985)), but nonetheless, cautioned the government against investigating individuals based upon their use of an attorney. With the decision in hand, von Stein immediately proceeded to breach all rules and the decision. Without the required permission of the Commissioners, von Stein made a criminal reference to the Justice Department (Southern District) ("Justice"). A comprehensive investigation of Sprecher and all the entities he controlled, as well as all his clients, was initiated by the SEC, Justice Department, and the IRS. The IRS' aid was enlisted to investigate Sprecher and a religious organization that Sprecher controlled, Kahila Kadeshia Parkofski ("KKP"). Von Stein was

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fashion to these allegations. There was not even a pro-forma denial. These allegations must therefore, be deemed to be true (which they are). *Celotex Corporation v. Catrett*, 106 S.Ct. 2548 (1986).

aware of Sprecher's relationship to KKP from information given to von Stein when Sprecher testified in front of von Stein in 1985, *Sprecher v. von Stein*, op cit.

All these investigations failed to produce any facts which could lead to any civil or criminal charges against Sprecher. These investigations did lead the government to discover that a law client's of Sprecher, Louis Foti ("Foti"), could be charged with numerous crimes, including but not limited to stock fraud involving the Mennonite community, failure to file or pay taxes, use of false Social Security numbers, insurance fraud. Rather than bringing charges against Foti and causing such activities to end, the government allowed Foti to continue in such activities as long as he would provide information concerning Sprecher; attempt to lead Sprecher into illegal activities, and act as a spy in Sprecher's law office, searching the office and reporting to the Justice Department and the SEC. Such searches were obviously illegal and contrary to this Court's directions in *Sprecher v. von Stein*, op cit.

One of the numerous bits of incorrect and fanciful information Foti provided to the government was a claim that Sprecher possessed a phony passport. A lengthy investigation initiated by U.S. Attorney's office involving the use of the FBI, State Department, Anti-terrorists organizations and local police found that this information from Foti was just one of the numerous pieces of false information provided by Foti. The government, at a later date, ascertained that Foti was a manic depressive (a type of severe mental disorder which involves illusions) and, therefore, Foti's irrational acts and misinformation were understandable. Additionally, Foti was under constant medication for his psychotic disorder.

Rather than stopping Foti's illegal activities which resulted in severe harm to the public, the SEC (von Stein) and the Justice

Department allowed Foti to continue, so that Foti would provide information concerning Sprecher's clients and cases to the government. The information, though not the source, was transmitted to various agencies. This situation continued for approximately two years with Foti making money through illegal activities, not paying taxes, searching Sprecher's office and attempting to entrap Sprecher without any success.

Incwell

While the SEC in Washington, in conjunction with the U.S. Attorney's office of the Southern District of New York were involved in their illegal activities with Foti, Sprecher was defending clients in Salt Lake City, incurring the wrath of the Salt Lake City SEC, who subpoenaed his office bank accounts, telephone records, as well as records of entities he worked with or controlled. Additionally, the aid of the Salt Lake City FBI was enlisted, which initiated a sting operation against Sprecher, and sent two agents with ERISA authority to tape Sprecher at a meeting in Sprecher's law office on January 4, 1990. The authority was granted in December 1989. Washington SEC did not reveal to anyone that its source of information was Foti, nor did Kenneth Israel, the Salt Lake City SEC Branch Chief, inform or obtain permission from the Washington SEC, a required step since Sprecher's law office was out of Israel's jurisdiction. The Salt Lake City FBI did not obtain clearance to operate in New York, a required procedure. The reason for the failure to request permission was that the Salt Lake City SEC and FBI wanted the glory of catching Sprecher.

Salt Lake City's success was identical to that of the Southern District's U.S. Attorney's office and Washington SEC. Instead of catching Sprecher, they caught and arrested Foti, but were unable to find any wrongdoing on the part of Sprecher. Foti, who was working under a cooperation agreement, flagrantly breached the agreement.

Nonetheless, Sprecher was to be charged with something. The original plan was simple, conceal Foti's arrest in Salt Lake City, indict Sprecher on frivolous charges of perjury in front of von Stein in testimony in 1985, five years prior, conceal from the Grand Jury documents referring to the fact that the IRS found KKP to be legitimate,[4] accuse Sprecher of sending false documents to the SEC which Foti had sent, and were correct. Additionally, to give satisfaction to Salt Lake City, accuse Sprecher of making a false affidavit to court in Salt Lake City, even though the court in Salt Lake City had been informed by the SEC of the typographical error in the affidavit and ignored it. The government could, therefore, not bring charges in Salt Lake City on this count.

To insure that Sprecher would immediately cave in — plead guilty and cooperate against his clients (thereby avoiding any danger of revelation of the above-described illegal and embarrassing activities) — the U.S. Attorney's office determined to arrest Sprecher and have him incarcerated in the worst floor of MCC New York.

Bail

Anyone unfamiliar with the Southern District of New York ("Southern District") and familiar with the Constitution would assume that it would be extremely difficult to have bail denied to an attorney with social and economic ties to the United States, a citizen of only one country, the United States. Justice was familiar with the Southern District, it waited until it knew that Judge Owens (a judge

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[4] Contrary to the Second Circuit's opinion (A 4), Sprecher was never charged, much less convicted of tax fraud. The IRS refused to grant permission for tax charges to be brought since they knew of Sprecher's innocence and had no axe to grind. The Justice Department, therefore, charged Sprecher under 18 U.S.C. 371.

known for his pro-government as well as anti-orthodox Jewish stance, was sitting at Special Term). The AUSA then lied and told Judge Owens that a CI whose credibility had been corroborated had informed the government that Sprecher had a false passport and intended to flee to Israel, that Sprecher had a business in Israel and that government's own investigation indicated that Sprecher had a phony passport. Of course, Foti (the CI) had proven not to be credible, the government knew Sprecher, based upon the previous thorough investigation, had no phony passport. Judge Owen did not believe in bail hearings. All he did was listen to the government and then deny bail. Judge Owen became indignant when the government's statements were questioned. Moreover, Sprecher was an Orthodox Jew and Owens explained that previously he had an Orthodox Jew in front of him and that Orthodox Jew's family had left to Israel. The government kept Sprecher incarcerated and delayed bringing Sprecher to court for a wheel arraignment, obviously trying to arrange, based upon knowledge of which judges were available, the wheel selection. During this time, the government tried to deprive Sprecher of his religious rights while arranging for more illegal searches of Sprecher's office and destruction of exculpatory material.

The government was unsuccessful in its original plan of having Sprecher come to some arrangement. Offers for a deal which involved "forgetting about attorney/client privilege" were rejected by Sprecher. In response to Dr. Sprecher's failure to cooperate, the U.S. Attorney's office, with the aid of the SEC, concocted superceding indictments based upon the ever-compliant psychotic, Foti. Whatever testimony was requested by the government, Foti supplied. Indeed, when a superceding indictment was demonstrated to be legally defective, Foti changed his testimony to conform with a later indictment. Thus, Foti's statements at one of his plea elocutions, which were meant to support the government's first superceding

indictment, differed significantly from Foti's testimony at Sprecher's trial. Sprecher's trial occurred on charges contained in a third indictment which alleged facts contrary to those contained in the first superceding indictment.

Since Foti's credibility was of great significance, the U.S. Attorney determined to bolster Foti's credibility. In furtherance of this goal, Foti's breach of his original cooperation through his illegal activities in Salt Lake City, as well as his arrest in Salt Lake City were concealed. Foti went as far as testifying at Dr. Sprecher's trial that no one had told him that he (Foti) had committed a crime in Salt Lake City. Even more shocking was the testimony under oath of an AUSA at hearing. The AUSA falsely and perjuriously testified that Foti's original cooperation agreement had only been breached at a time significantly later than the Salt Lake City arrest, and the cause of Foti's breach was some activity with Sprecher which was only discovered by the government after Sprecher's arrest. All this testimony of the AUSA was perjurious, and its aim was to bolster Foti's credibility, while simultaneously destroying Dr. Sprecher's. Another AUSA, in order to bolster Foti's credibility and prevent Dr. Sprecher from mounting a defense, submitted a false affidavit as to who and when certain tape transcriptions were made, and as to the existence of logs of these tapes. To support this false affidavit, the transcripts of the tapes were tampered with.

To further conceal Foti's arrest in Salt Lake City, the government did not produce 302s relating to Foti's arrest and his illegal activities in Salt Lake City and Salt Lake City's failed sting operation relating to Sprecher. These documents would have established various motives for Foti to lie, including his anger at Sprecher for causing him (Foti) to be caught in a sting operation which only occurred because of Sprecher. The documents would have also provided the motive for the government to suddenly, after

five years, charge Sprecher with perjury and other activities when, at all times, they were aware of the facts and allowed the activities. Of course, the motive of the government to indict Dr. Sprecher on baseless and false charges would have been revealed.

Since Foti's cooperation was necessary, but Foti was untrustworthy, the government made an unwritten agreement with Foti that the charges which were to be brought against him (Foti) for his crimes in Salt Lake City would depend on the recommendation of U.S. Attorney for the Southern District of New York. The Southern District's recommendation would, in turn, depend on the value of the aid rendered by Foti regarding Sprecher. This arrangement, which was not revealed to Sprecher at trial, served a two-fold purpose. Firstly, Sprecher could not, by reviewing court records, ascertain Foti's crime and arrest in Salt Lake City, and secondly, a hammer could be held over Foti's head to insure his compliance with the U.S. Attorney's desires. Only significantly after Dr. Sprecher's conviction were charges brought against Foti for his crimes in Salt Lake City. Foti's sentencing was delayed for approximately four years after Dr. Sprecher's conviction. For all of his crimes, including brazenly breaching a cooperation agreement, Foti received no fine, or prison sentence.

The sentencing judge explained that one of the reasons for this light sentence was Foti's diminished capacity. Foti was suffering from a severe mental condition (psychosis). He was a manic depressive, a condition involving illusions, who was on constant medication. Foti's mental condition and use of medication existed at the time of Foti's testimony at Dr. Sprecher's trial. These facts were not revealed by the U.S. Attorney or anyone else during Sprecher's trial and Foti's criminal case files were sealed.

To insure Foti's cooperation and to bolster Foti's credibility, the SEC did not bring charges against Foti for violating a prior consent decree, nor did they bring a civil suit for disgorgement of Foti's ill-gotten gains. Foti, as an additional bribe for his testimony, was not charged by the New York State attorney for insurance fraud.

Another witness, a James Bullard, testified that he was not an officer or director of a certain corporation and had not represented himself as such at a certain meeting. The AUSA had in his possession notes taken contemporaneously at the meeting by another participant that demonstrated that Bullard's testimony was perjurious. The government has never produced these notes. Pursuant to agreements with the SEC and AUSA's, Bullard was not charged in any civil or criminal proceeding.

In order to prejudice the court against Dr. Sprecher in the very early stages of Sprecher's trial, the U.S. Attorney brought as a witness a Carol Bernard to testify concerning Dr. Sprecher's character and to intimate that in some unrelated matter, Dr. Sprecher had committed forgery. To bolster Bernard's credibility, the government had her testify that she was only fined by the National Association of Security Dealers ("NASD"), when the AUSA knew that Bernard was expelled from the NASD, and barred forever from associating with any broker/dealer for forging clients' signatures on their stock certificates and selling them without the clients' permission. In response to Dr. Sprecher's first post-conviction motion, the government denied Bernard's testimony was false and, to support this claim, an AUSA produced a computer run, which he represented as a NASD computer run which stated that Bernard was allowed to resign (for unknown reasons). Of course, this was not a NASD computer run, but a SEC computer run. By this misrepresentation, Justice hoped to accomplish two goals; firstly, to demonstrate that Bernard had not lied, and secondly, to conceal the

SEC's bribery of Bernard. The SEC allowed Bernard to resign and did not bring any civil charges against her. Justice also did not bring criminal charges against Bernard.

In order to prejudice the court against Sprecher and to provide a rationale for Sprecher's purported perjury, the government, while not charging Sprecher with tax violations, continuously represented to the court that KKP, a charitable entity controlled by Dr. Sprecher, was a phony tax-dodge organization. The AUSA concealed the fact that a joint Justice Department, SEC and IRS investigation had found Sprecher and KKP to be innocent of any tax fraud. The IRS, who had no axe to grind, therefore refused to give permission for tax charges. Up to the present day, neither Sprecher or the KKP has been subject to either civil or criminal tax charges and KKP still maintains its tax exemption. The statement by the Second Circuit (A 4) that Dr. Sprecher was convicted of tax fraud is just one of numerous examples of the Second Circuit being unconcerned with the law or facts in relationship to Sprecher.

Reaction of the Courts

The Southern District and the Second Circuit condoned or acquiesced in all of these *Giglio v. United States*, 405 U.S. 150 (1972), *Brady v. Maryland*, 373 U.S. 883 (1963), 5th and 6th Amendment violations. The method utilized by the courts for such acquiescence were unpublished District Court decisions, sustained by unpublished Court of Appeals decisions which contained rulings such as:

1. The government is not required to produce notes taken contemporaneously of a witness statement, only if the witness himself made the notes are they required to be produced;

2. The government can conceal an unwritten agreement with a witness as long as the witness does not perjure himself. Concealment or misleading statements are allowed;

3. No hearing is required to determine the knowledge of the government of the false statements of its witness, if the court can speculate that the witness did not know that he or she was lying, even though the government knew the testimony was false;

4. As long as the allegations are based upon hearsay evidence, even government documents, no hearing is required on a 28 U.S.C. 2255 petition; even if the government does not deny the allegations contained in the petition, and these allegations mandate reversal of the conviction, This, of course, would eliminate almost every 2255 hearing since almost any out-of-court statement including government documents, are hearsay;

5. The government may use as its main witness a psychotic on medication without revealing these facts to the court or to the defendant;

6. The requirements for an "Evidentiary Hearing" (A 4) are fulfilled when only the government is allowed to call witnesses and engage in discovery. The government can additionally choose to use affidavits rather than live testimony and the confrontation clause of the constitution is satisfied if the defendant is a former attorney. A defendant who was formerly an attorney has the power to cross-examine affidavits.

Dr. Sprecher's case had numerous other similar disingenuous rulings unrelated to the issue of witnesses. Dr. Sprecher has only presented some of the more outrageous rulings relating to witnesses to provide the basis for demonstrating the pandora's box which exists as long as there is no red line rule prohibiting the bribery of witnesses.

ARGUMENTS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

I. The Tenth Circuit's Definition of 201(c) Is Contrary to the Intent of Congress and Results in 201(c) Being Void for Vagueness And/or Overbroad, as Well as Violative of the 5th and 6th Amendments of the United States Constitution.

Statutory Consultation

Dr. Sprecher adopts and incorporates the viewpoint and arguments presented in the *Singleton II* minority's opinion against the *Singleton II* majority's statutory interpretation of 201(c). Dr. Sprecher additionally adopts and incorporates the arguments against the *Singleton II* majority opinion relating to statutory interpretation contained in the petition for a writ of certiorari for Sonya Evette Singleton, Oct. Term 1998 ("*Singleton* Petition for Certiorari").

The argument against the *Singleton II* majority's opinion statutory interpretation is supported by another decision of this Court which was apparently overlooked by the opponents of the *Singleton II* decision. This Court, in *SEC v. Sloan*, 436 U.S. 103 (1978), was faced with the issue of whether the SEC could continue its long-standing practice of issuing a series of ten-day suspension orders. Sloan argued that the plain language of the statute 15 U.S.C. 781(k), which authorized the commission to "summarily suspend trading in any security . . . for a person not exceeding ten days" prohibited

continuous ten-day suspension orders. The SEC argued that the ten-day limitation on suspensions referred to "the duration of a single suspension order." *Sloan*, op cit. Certainly, a less strained interpretation than the statutory interpretation contained in the *Singleton II* holding.

In support of its interpretation, the SEC argued that:

1. It was undisputed that it had the power to issue a new suspension order 30 days after discovery of a new manipulative scheme. Therefore, if a new manipulative scheme was found on the tenth day, the SEC could issue a new suspension order. Even in the absence of a new manipulated scheme, the SEC could order a new suspension since the statute did not speak directly of necessity of a new scheme. *Sloan*, op cit. 114.

2. That Congress had implicitly approved of the SEC's interpretation by reenacting the statute after the SEC had informed a congressional committee of its interpretation. Indeed, one congressional committee had even explicitly given its approval to the SEC's interpretation. *Sloan*, op cit. 119-120.

3. That the SEC's interpretation was "consistent and longstanding, dating from 1944. It is thus entitled to great deference." *Sloan*, op cit. 115.

4. That the SEC's interpretation furthered the "remedial purpose of the statute." *Sloan*, op cit. 115.

This Court rejected all these arguments which, while similar to those given by the *Singleton II* majority, were certainly stronger, more logical, and at least colorably consistent with established rules of statutory construction. This Court held:

> "In sum, had Congress intended the Commission to have the power to summarily suspend trading virtually indefinitely, we expect that it could and would have authorized it more clearly than it did."

Sloan, op cit. 122.

With respect to 201(c)(2), Congress certainly, if it had such an intention, could have stated certain individuals were excluded from the reach of 201(c)(2).

Vagueness

The *Singleton II* holding results in a lack of clarity as to who is included under the provision of 201(c)(2), and/or what type of bribery is included.

In *Singleton II*, the original issue presented to the court was whether an assistant U.S. Attorney could offer leniency to a co-defendant in exchange for "truthful testimony." The *Singleton II* court, while expressing the issue in parts of its decision in terms of "officers of the Department of Justice or the United States Attorney" (*Singleton II*, op cit. 1299-1300), in its phasing of the issue and its holding speaks in more generalized terms. "The question before us is whether Section 201(c)(2) applies to the government in the prosecution of criminal offenses." *Singleton II*, op cit. 1298.

A simple reading of what the *Singleton II* court considered the issue would inescapably lead to the conclusion that the issue was whether 201(c)(2) applied to activities of the federal government, related to a criminal prosecution, no matter which agency or branch. The obvious interpretation is supported by the activities of such agencies, like the SEC, IRS, postal inspectors who routinely offer bribes to government witnesses in criminal prosecution. (No civil prosecution, no payment of fines or other payments.)

The expansive interpretation of the *Singleton II* court holding is supported by the *Singleton II* court's own description of its holding which speaks in general terms of "an agent of the government." "Our conclusion in no way permits an agent of the government [emphasis added] to step beyond the limits of his or her office an offer to a witness other than one traditionally exercised by the government. A prosecutor who offers something other than a concession normally granted by the government in exchange for testimony . . . is divested of the protective mantel of the government. . . . While we agree with that notion, we simply believe this particular statute does not exist for the government." *Singleton II*, op cit. 1302.

In *McBoyle v. U.S.*, 283 U.S. 2527, this court explained that the touchstone of whether a statute, either standing alone or as "construed by the courts" [emphasis added] was void for vagueness, was whether it made it reasonably clear at the time of the charged conduct that the conduct was criminal.

The *Singleton II* decision makes two important issues unclear. Firstly, what "is a concession normally granted by the government." In our present day, cooperating witnesses like Foti, in Sprecher's case, are allowed to engage in illegal activities (stock fraud), keep the ill-gotten gains without paying taxes; cooperating witnesses are bribed with cash for living expenses, trips and all the other good

things of life. If this is what the *Singleton II* court meant, then the word "traditional" has no limiting function. If the court did, indeed, desire some limit, this must be clarified. The second issue which is unclear is who is "an agent of the government." Since informants have been held to be agents of the government and they are used for criminal prosecutions, an individual such as Foti could bribe by monetary payments, other witnesses to support his story, of course, always adding the words "be truthful." Foti's motives would be to receive a lower sentence and keep his ill-gotten gains. A federal prison guard could bribe an inmate to be a witness by giving him special privileges or winking an eye at contraband.

The following scenario would be permitted: a clerk at a post office who believes that the individual who every day spits on the post office floor is "Y", but the clerk has been unable to catch "Y". Being a conscientious clerk, acting with the outer parameters of his duty, he approaches "X", tells him his problem, and offers "X" the opportunity not to wait on line if he testifies that he "truthfully saw" "Y" spitting. "X", who has no idea of the serious nature of the charge, but knows the difficulty of hour-long waits for postal service, agrees. The clerk contacts his superior, who contacts the U.S. Attorney, who is very interested since "Y"'s testimony is necessary in another case. "Y" is arrested, and not granted bail, since he is a danger to the community. He spreads germs where children play on the floor. "Y" is sent, as Sprecher was, to an unpleasant location in a federal prison until "Y" agrees to testify.

This scenario is certainly not impossible under *Singleton II*'s holding.

Overbreadth

If the expansive interpretation (a logical interpretation) of *Singleton II*'s holding is made, then as far as the government or

employees of the government are concerned 201(c) does not exist. The exception swallows up the rule and a large privileged class of government employees who can bribe witnesses with any sort of compensation is created and illegal actions are condoned. If a narrower interpretation is applied, all government employees who give almost any sort of bribe could argue void for vagueness and prevail.

Due Process

Fifth and Sixth Amendments

The expansive interpretation of *Singleton II* impinges on Fifth and Sixth Amendments of the U.S. Constitution. In *Giglio* and *Brady*, this court placed certain well-known limitations on the U.S. Prosecutor. The holdings in these cases which are concerned with the Fifth and Sixth Amendment have been gradually eroded. One of the most significant areas of erosion has been in relationship to violations of these holdings through the use of agencies, localities or entitles other than the U.S. Prosecutor or Justice Department, especially where the Justice Department was not directly involved. By giving the stamp of approval on bribery by any government agent, bribery agreements which would have had to be revealed to the defense, if done by an AUSA, would now be concealed. A series of agreements would be made for payment for witness testimony by agencies other than Justice, with the stamp of approval of *Singleton II*. Justice could and would deliberately close their eyes.

Narrow Interpretation

A ruling by this court narrowing the exclusion of government employees from the provisions of 201(c)(2) to the actual AUSA's in the criminal case and the payment to solely a recommendation to the court for leniency, might avoid the issue of overbreadth and vagueness, and even synchronize the *Singleton* exception to 201(c)(2) with other statutes such as U.S.S.E. Section 5k1-1(a)(2), nonetheless,

the narrowing of the exception would bring this court into the domain of Congress. If Congress desired any exclusion, it could easily and clearly have stated it. Additionally, the *Singleton II* court's rationale for the exclusion of government employees, the sovereignty argument, would be significantly less convincing since other government employees aside from AUSAs represent the sovereign.

II. Allowing Bribery Will Encourage the Improper Use and Abuse of Prosecutorial Power

Dr. Sprecher adopts and incorporates all the arguments contained in the section entitled "Argument III" of Singleton's Petition for Certiorari as well as presenting his own arguments.

The federal criminal court system, unlike the Federal civil system, is not a level playing field. While under the civil system, there is liberal discovery for both sides, in the criminal system, there are numerous limitations on when and what a defendant may obtain from the government, when a witnesses may be deposed, if ever. The government can compel testimony through the use of grand jury subpoenas. The government, unlike the defense, can arrange for immunity in exchange for testimony. The government can and does invoke privilege, thus, in Sprecher's case, while the SEC worked hand in hand with Justice, the SEC invoked privilege to prevent production of documents and the testimony of Von Stein. This invocation continued even after trial with regard to Freedom of Information requests. Various agencies of the government, in practice, with the approval of District Court judges, act as separate entities, documents containing exculpatory material in one agency like the SEC or IRS do not have to be delivered to the defendant by the Justice Department. A defendant who argued that his left hand is not responsible for his right hand would be charged with obstruction.

The federal court system has numerous judges who are openly pro-government, like the judge who, on the mere false representations of the government, denied Dr. Sprecher bail. This bias is understandable since many judges are selected from former AUSA who consciously or unconsciously have a pro-government bias. The Justice Department opposes the appointment of openly pro-defendant judges and has been very successful in this opposition.

Even judges who have no such pro-government bias are reluctant to believe brazen wrongdoing on the part of AUSA's, and moreover, when such conduct is proven, as in Sprecher's case, judges ignore it or cover it up believing that this was just a temporary overzealous reaction. In the rare event that a judge reacts to illegal conduct by an AUSA, the rule of prosecutorial discretion almost invariably prevents an AUSA who engaged in criminal conduct, such as encouraging a witness to commit perjury, from being criminally prosecuted.

Protections established by Congress or this court are eroded. The Freedom of Information act is so manipulated that, in Sprecher's case, it took almost four years to get any information. Decisions by this court requiring the government to search their files and evaluate and explain the non-production of documents, are used as excuses for delay and then ignored. The information that Sprecher got after almost four years, consisted of a minuscule portion of the government's documents. The documents Dr. Sprecher obtained came from one agency, which provided only a small portion of the requested and relevant documents with the vast majority of the pages redacted. The Justice Department provided only one page.

Federal appeals courts have developed certain well-known procedures to avoid overturning verdicts and district court decisions — stare-decisis is the holy grail.

The doctrine of harmless error allows most violations or errors to be overlooked. If there is any factual basis, no matter how remote, for a judge's decision, the decision is sustained. When the facts do not support the decision, appeals courts, in some instances, bend or even change the facts to avoid remanding a case on what they consider a small or difficult issue.

Procedural bars are established, which concurrently with concealment of evidence by the government by the manipulation of the Freedom of Information Act limit and even prevent appeals. Decisions which have no basis in law are unpublished and avoid the issues, summary orders using such words as "substantially for the reasons stated below" are used to avoid any embarrassing review and/or bad precedent.

Dr. Sprecher's experiences, while shocking and unconscionable, are unfortunately not unique. They are not a mere aberration based on the fact that Dr. Sprecher was represented during trial by a conflicted attorney,[5] and had a bench trial by an actually prejudiced judge. The only aberration is Dr. Sprecher's continued search for justice and hope for a change in the system. The *Singleton II* decision is a change in the wrong direction. It will cause a field with swampland for defendants rather than merely an unlevel field.

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[5] At trial, Dr. Sprecher was represented by Ivan Fisher ("Fisher"), who failed to inform Sprecher that he (Fisher) was on federal criminal probation, was flagrantly violating the terms of his probation; could have been incarcerated by the Justice Department without a trial, and been subject to a long jail sentence, and therefore, could not afford to antagonize the government. Fisher was, at one point, a cocaine addict.

Once government employees are held to be immune because they are representatives of the sovereign, they will continue to press this issue in an attempt to become immune with regard to other laws. Bribery is no less serious a crime than perjury. Indeed, as demonstrated by Sprecher's case, perjury is already used by the government and ignored by the courts.

This is not a perfect world, where AUSA's are interested in justice, they are interested in success, which is based on their conviction rate.

Red Line

Only a red line rule like that established by Congress in 201(c)(2) prohibiting bribery and applied to government employees, as intended by Congress, will stop the erosion of the Federal Criminal Justice System and remind the AUSA's of the real goal of the Judicial system, a goal carved in the oak panel of the anteroom of the United States Attorney General's office. "The United States wins its points whenever justice is done its citizens in its courts." The United States does not win when a stamp of approval is given allowing bribery of witnesses by the government.

CONCLUSION

For the reasons hereinabove set forth, the Petitioner respectfully submits that this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: Queens, New York
June __, 1999

APPENDIX

SDNY-NYNY
90-C4-234
CEDARBAUM

UNITED STATES COURT OF APPEALS
FILED
MAY 28, 1999
KAREN GREVE MILTON, ACTING CLERK
SECOND CIRCUIT/STAMP

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THE CASE, IN A RELATED CASE, OR IN ANY CASE FOR THE PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26th Day of May, one thousand nine hundred and ninety-nine.

PRESENT:

HON. JOSEPH M. McLAUGHLIN,
HON. GUIDO CALABRESI,
Circuit Judges,

HON. ALVIN HELLERSTEIN,

District Judge.[*]

UNITED STATES OF AMERICA
Appellee,

v.

SUMMARY ORDER
#98-1444

G. ALEXANDER NOVAK,
Defendant,

BENJAMIN G. SPRECHER,
Defendant-Appellant.

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[*]The Honorable Alvin K. Hellerstein, Unites States District Judge for the Southern District of New York, sitting by designation.

Appearing for Appellant: BENJAMIN G. SPRECHER, Rego Park, NY

Appearing for Appellee: LEWIS J. LIMAN, Assistant United States Attorney, Southern District of New York, New York, NY

Appeal from the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, *Judge*)

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Benjamin G. Sprecher, *pro se*, appeals from a judgment of the United States District Court for the Southern District of New York (Cedarbaum, *J.*) Dated July 24, 1998. The district court construed Sprecher's motion, styled as a "Motion for a Writ of Error Coram Nobis," as a 28 U.S.C. § 2255 habeas petition and then dismissed the petition as a second or successive petition pursuant to 28 U.S.C. § 2244(b)(3)(A). We conclude that the

district court erred by treating Sprecher's motion as a § 2255 petition rather than as a petition for coram nobis. But, since Sprecher has not met the requirements to obtain coram nobis relief, we affirm the district court's judgment

I

Sprecher was convicted in 1992 of (1) tax fraud, (2) securities fraud, (3) perjury, and (4) obstruction of justice. His conviction was affirmed on direct appeal. *See United States v. Sprecher*, 988 F.2d 318 (2d Cir. 1993). In 1993, Sprecher brought a series of motions that the district court construed as a § 2255 petition. After holding an evidentiary hearing, the district court denied the petition. We affirmed the district court's decision. *See Sprecher v. United States*, 50 F.3d 3 (2d Cir. 1995) (Table). In 1996, shortly before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat 1214, Sprecher brought a second § 2255 petition.

This petition, which was virtually identical to Sprecher's first § 2255 motion, was denied by the district court. The district court's order was affirmed. *See Sprecher v. United States*, No. 97-2366, 1998 WL 639265 (2d Cir. Mar. 12, 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 63 (1998).

In 1998, well after Sprecher had completed his prison sentence and term of supervised release, he brought a "Motion for a Writ of Coram Nobis" seeking post-conviction relief. This motion, which contained arguments that were almost identical to those in his two prior § 2255 petitions, was deemed a habeas corpus petition by the district court and dismissed as a successive petition under the AEDPA. Sprecher now appeals. His main contention is that his motion before the district court cannot be a successive habeas petition since it seeks a writ of coram nobis, and therefore, is not a habeas petition at all.

II

We have previously stated that "[c]oram nobis is essentially a remedy of last resort for petitioners who are no longer in custody pursuant to a criminal conviction and therefore cannot pursue direct review or collateral relief by means of a writ of habeas corpus." *Fleming v. United States*, 146 F.3d 88, 89-90 (2d Cir 1998) (per curiam). Since Sprecher is no longer in custody, he is not, on the face of his petition, barred from seeking coram nobis relief. Moreover, we see no reason to construe Sprecher's request for coram nobis as a § 2255 petition.

Treating *pro se* motions for post-conviction relief as § 2255 petitions made sense prior to the enactment of the AEDPA, since § 2255 was generally the best avenue for such relief and recharacterizing a *pro se* motion as a habeas petition could not harm the petitioner. *See Adams v. United States*, 155 F.3d 582, 583 (2d Cir. 1998) (per curiam). Since, under most circumstances,

the AEDPA limits litigants to one § 2255 petition, however, there is now a real possibility that construing a *pro se* motion as a § 2255 petition may injure the litigant. It may deprive him or her of a review of the merits of the relief sought, if he or she has previously filed a § 2255 petition. And it may foreclose the possibility of future relief that could otherwise have been available only through a § 2255 petition. *See id.* at 583-84. Thus, as we said in *Adams*, district courts should only recharacterize such motions where the litigant, "with knowledge of the potential adverse consequences of such recharacterization, agrees to have the motion so recharacterized," or where the court "offers the movant the opportunity to withdraw the motion rather than have it so recharacterized." *Id.* at 584.

III

Assuming then, without deciding, that a coram nobis petition might lie in some analogous circumstances, we turn to address the merits of Sprecher's claim for such relief.[2]

To obtain coram nobis relief, Sprecher must show (1) that he is suffering continuing legal consequences from his conviction, (2) that cause exists for his failure to seek appropriate earlier relief, and (3) that he will be prejudiced by a denial of the relief sought because his convictions were unjust. *Fleming*, 146 F.3d at 89-90.

We will assume without deciding that Sprecher has satisfied the first of these requirements because he remains disbarred from legal practice as the result of his conviction. He

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[2]Since the merits of Sprecher's case are sufficiently clear, we do not need to consider, let alone decide, the scope of coram nobis following the passage of the All Writs Act, 28 U.S.C. § 1651(a), or whether and to what degree coram nobis is subject to the AEDPA.

has failed, however, to demonstrate cause and prejudice arising from the two new claims he raises for the first time on his appeal.

For his first new claim, Sprecher relies on the holding of a now reversed panel of the Tenth Circuit in *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999), to argue that the government bribed cooperating witness Fori in violation of the federal anti-gratuity statute, *see* 18 U.S.C. § 201(c)(2) (1994). We are unpersuaded by Sprecher's *Singleton* argument.

For his second new claim, Sprecher relies on *United States v. Ali*, 68 F.3d 1468 (2d Cir. 1995), to contend that his convictions for making false statements in a matter within the jurisdiction of a government agency in violation of 18 U.S.C. § 1001 must be vacated. Specifically, Sprecher complains that Judge Cedarbaum failed to find that the false statements for which he was convicted were "material" as our decision in *Ali* requires. *See Ali*, 68 F.3d at

1474-75. Because Sprecher's argument based on *Ali* was available to him when he pursued his second § 2255 petition, he cannot demonstrate cause for failing to raise it previously. Moreover, we are satisfied that the fact that Judge Cedarbaum did not make any materiality finding was harmless. *See Blizerian v. United States*, 127 F.3d 237, 242 (2d Cir. 1997).

Accordingly, after considering all of Sprecher's contentions, we deny his motion for coram nobis relief.[3]

For the Court:

KAREN GREVE MILTON, Acting Clerk

by Lucille Carr/signature

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[3]Sprecher's request that his case be transferred to the federal district court in Salt Lake City is without merit and is therefore also denied.